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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**JOSE REYES ZAPATA,**

**Petitioner,**

**vs.**

**ICON HEALTH AND FITNESS  
and ZURICH AMERICAN  
INSURANCE CO.,**

**Respondents.**

**ORDER AFFIRMING  
ALJ'S DECISION**

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**ORDER OF REMAND**

**Case No. 05-0257**

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Icon Health and Fitness and its insurance carrier, Zurich American Insurance Co., (hereafter referred to jointly as "Icon") ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Marlowe's award of benefits to Jose Reyes Zapata under the Utah Occupational Disease Act, Title 34A, Chapter 3, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

**BACKGROUND AND ISSUE PRESENTED**

Mr. Zapata claims benefits for an occupational disease he developed from working at Icon. Icon admits that Mr. Zapata's exposure to chemicals at work caused his skin condition, but denies that he is entitled to permanent total disability benefits as a result. Following an evidentiary hearing, Judge Marlowe entered a preliminary order for permanent total disability benefits.

In its motion for review, Icon contends that Mr. Zapata failed to establish the elements necessary to his claim and therefore Judge Marlowe's preliminary order for benefits should be reversed.

**FINDINGS OF FACT**

The Appeals Board adopts Judge Marlowe's finding of fact. The facts relevant to the motion for review are as follows:

Mr. Zapata started working for Icon in 1990, initially starting as a welding helper and then working up to a welding supervisor building pieces of exercise equipment. In 1995, unrelated to his occupational disease, Mr. Zapata injured his right arm and shoulder at work. He reinjured his arm at work in 2004 and has had three surgeries on his right shoulder and one surgery on the right elbow. In 1997 and 1998, Mr. Zapata began developing rashes on his arms, neck, and legs and was diagnosed

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with dermatitis. The skin problems continued, and by August 2004 the dermatitis was diagnosed as chronic and his doctor began taking him off work. It was noted that Mr. Zapata's condition became aggravated when he attempted to return to work. Thus, by November 24, 2004, his doctor permanently restricted him from working with chemicals, which was typical in his duties as a welder, and recommended a desk job. Patch tests have shown Mr. Zapata reacts to chrome and cobalt, both of which are present in stainless steel. Icon terminated Mr. Zapata's employment on January 5, 2005.

Dr. Fotheringham, Icon's medical consultant, examined Mr. Zapata and noted large areas of eruptions on his arms and legs that he determined were caused by Mr. Zapata's exposure to various chemicals at Icon. He assessed a 9% whole person impairment for the dermatitis. Also, because Mr. Zapata reinjured his right arm at work in 2004 and was undergoing further treatment, Dr. Fotheringham evaluated the arm and assessed a separate 7% whole person impairment. He recommended permanent restrictions on the right arm of frequent lifting of 10 pounds, no lifting more than 20 pounds, and minimal to no overhead lifting. Mr. Dell Felix conducted a functional capacity evaluation and indicated Mr. Zapata tested in the medium performance level for jobs. However, with this finding, Judge Marlowe took judicial note that a "medium" performance level would require exerting 20 to 50 pounds of force occasionally and/or 10 to 25 pounds of force frequently.

As of August 2004, Mr. Zapata was 43 years old and living in Logan, Utah. His first language is Spanish and, although he can converse sufficiently in English, his ability to read and write in English is limited. Most of his work background has been welding exercise equipment parts, with some previous work in construction. His education is limited, completing, at most, a 7<sup>th</sup> grade level in Mexico. Mr. Zapata testified to making regular attempts at finding employment but he was either not contacted regarding the positions or the positions only paid minimum wages. Mr. Zapata's average weekly wage in August 2004 was \$664.00 per week and the state average weekly wage was \$589.00.

At the hearing, a vocational expert identified several jobs that Mr. Zapata would be qualified for, although the highest rate of pay identified was \$445.00 per week (\$11.13 an hour), which was lower than the state's average weekly wage, and many of them required 20-50 pounds of lifting. The expert was also not aware whether any of the prohibitive chemicals or metals that Mr. Zapata had reactions to would be present with any of the positions identified.

**DISCUSSION AND CONCLUSIONS OF LAW**

The only issue before the Appeals Board is whether Mr. Zapata was entitled to a preliminary finding for permanent total disability benefits. Section 34A-2-413 of the Utah Workers' Compensation Act outlines the elements that an employee must satisfy in order to qualify for permanent total disability for either a workers' compensation claim or an occupational disease claim. Under the Act, Mr. Zapata must show that (1) he is significantly impaired as a result of the work

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accident or disease; (2) he is permanently and totally disabled, which is further determined by a four-part test found in subsection 413(1)(c); and (3) the work accident or disease was the direct cause of his disability.

In its motion for review, Icon disputes Judge Marlowe's factual findings on two elements under the four-part test for showing permanent and total disability. These required Mr. Zapata to show that (1) he can no longer perform the essential functions of the work activities that he was qualified to do until the time of his occupational disease and (2) he cannot perform other work reasonably available given Mr. Zapata's age, education, work experience, medical capacity and residual functional capacity. See § 34A-2-413(1)(c)(iii) and (iv.).

The Appeals Board first reviews Icon's contention that Mr. Zapata's impairments do not prevent him from performing the essential functions of the work activities he was qualified to do until August 2004. Icon contends that there were other positions Mr. Zapata could have been qualified to do at the plant, such as removing plastic from a mold and putting it into a box or placing a strip across the front of a synthetic belt, neither of which would require much if any qualifications. The evidence shows, however, that Mr. Zapata was qualified to perform welding work on exercise parts for 14 years, with duties that included cleaning metal parts with solvent, checking toolings and jibs, measuring the proper dimensions and angles for cuts, and supervising this work. While it is true that Mr. Zapata was acting as a welding supervisor at the time he could no longer work, the Appeals Board notes that his authority and supervisory skill were related to his expertise as a welder, which he is now prevented from doing because he can no longer work with the metals or chemicals involved with welding. The Appeals Board finds that Mr. Zapata's impairments prevent him from performing the essential functions of the work activities he was qualified to do until he contracted his work disease.

Icon's next contention is that Mr. Zapata cannot satisfy § 413(1)(c)(iv) because there was other work reasonably available given Mr. Zapata's age, education, work experience, medical capacity, and residual functional capacity based on several jobs identified at the hearing. First, however, none of the jobs identified paid higher than \$445.00 per week. Therefore, with respect to the positions that Icon identified, Judge Marlowe found that none of them constituted other work reasonably available because they would not pay the state's average weekly wage. In making this finding, Judge Marlowe relied on Commission Rule R612-1-10(D), which provides that other work is reasonably available if the work provides a gross income at least equivalent to:

- (1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or
- (2) The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

Icon argues that this finding was in error because the Commission had no statutory authority to make income part of the test for permanent total disability when it promulgated this rule.

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However, this questions was resolved in LPI Services v. Labor Commission, 173 P.3d 858 (Utah Ct. App. 2007)(currently under review with the Utah Supreme Court), wherein the Utah Court of Appeals affirmed the Commission's authority to promulgate this rule under the statutory provisions of § 34A-2-413(1)(c)(iv), specifically, consideration of the claimant's past work experience. Therefore, Judge Marlowe's consideration of this fact was appropriate and, according to the rule, none of the jobs Icon identified represent other jobs reasonably available to Mr. Zapata.

Second, Judge Marlowe's decision did not rely solely on the salary comparison in making her finding, but rather on several factors in concluding that no other jobs were reasonably available to Mr. Zapata, including his education, other past work experience, medical and functional capacity, as well as testimony that he was unable to find work. Aside from the physical restrictions Mr. Zapata has as a result of his skin condition, he also has permanent restrictions on his right arm of frequent lifting only 10 pounds and no lifting more than 20, which would disqualify him from jobs at the medium level classification. Mr. Zapata's previous work experience has been in welding, and before that, in construction. He has not graduated high school and he has a limited ability to read and write English. Mr. Zapata also testified that despite his attempts to find work, he has been unsuccessful. Further, many of the jobs Icon presented either would violate his lifting restrictions or did not exclude the possibility of exposure to the restricted chemicals or metals. The Appeals Board has reviewed the record and concurs with Judge Marlowe's finding that there is no other work reasonably available based on all the above stated factors.

In summary, the Appeals Board concurs with Judge Marlowe's finding that Mr. Zapata satisfied § 34A-2-413(c)(iii) and (iv) of the four-part test for proving he is permanently and totally disabled. Therefore the Appeals Board affirms Judge Marlowe's preliminary order for permanent total disability benefits.

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**ORDER**

The Appeals Board affirms Judge Marlowe's preliminary order for permanent total disability benefits. The matter is remanded to Judge Marlowe to hold further proceedings necessary to approve Icon's reemployment/rehabilitation plan for Mr. Zapata, and for such other action as is necessary to resolve this matter. It is so ordered.

Dated this 16<sup>th</sup> day of December, 2008.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.